

MEMORANDUM AND ORDER

California has a determinate sentencing law that allocated to judges the sole authority to find facts permitting the imposition of an upper term sentence. *Cunningham* held that placing sentence-elevating factfinding within the judge's province violates a defendant's right to trial by jury. *Cunningham*, however, reaffirmed *Apprendi v. New Jersey*, 350 U.S. 466, 490 (2000), which held that, under the Sixth Amendment, any fact (other than a prior conviction), that exposes a defendant to a sentence *in excess* of the *relevant statutory* maximum must be found

¹Defendant does not designate which subsection he is relying on for relief. Since he is relying on what he believes is a new rule of law that affects his sentence, the appropriate subsection is (6), “any other reason justifying relief from the operation of the judgment.” None of the other subsections are applicable.

by a jury. Defendant's statutory sentence was a minimum of twenty years and a maximum of life. He was sentenced to a term of 324 months – within the statutory penalty. The *Cunningham* case has no impact on Defendant's sentence.

IT IS THEREFORE ORDERED THAT:

- 1) The motion for relief from judgment (doc. 449) is **DENIED**.
- 2) Any appeal from this order will be deemed frivolous.
- 3) The Clerk of Court shall close the file.

s/Sylvia H. Rambo

SYLVIA H. RAMBO
United States District Judge

Dated: February 7, 2007.